

No. 13959

United States
Court of Appeals
For the Ninth Circuit.

VICTOR GOTHBERG, an Individual, Doing
Business as GOTHBERG CONSTRUCTION
COMPANY,

Appellant and Appellee,

vs.

BURTON E. CARR, JANE DOE CARR, His
Wife; JACK AKERS and SHERMAN
JOHNSTONE,

Appellees and Appellants.

Supplemental
Transcript of Record

Appeals from the District Court
for the Territory of Alaska
Third Division

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PAUL P. O'BRIEN
CLERK



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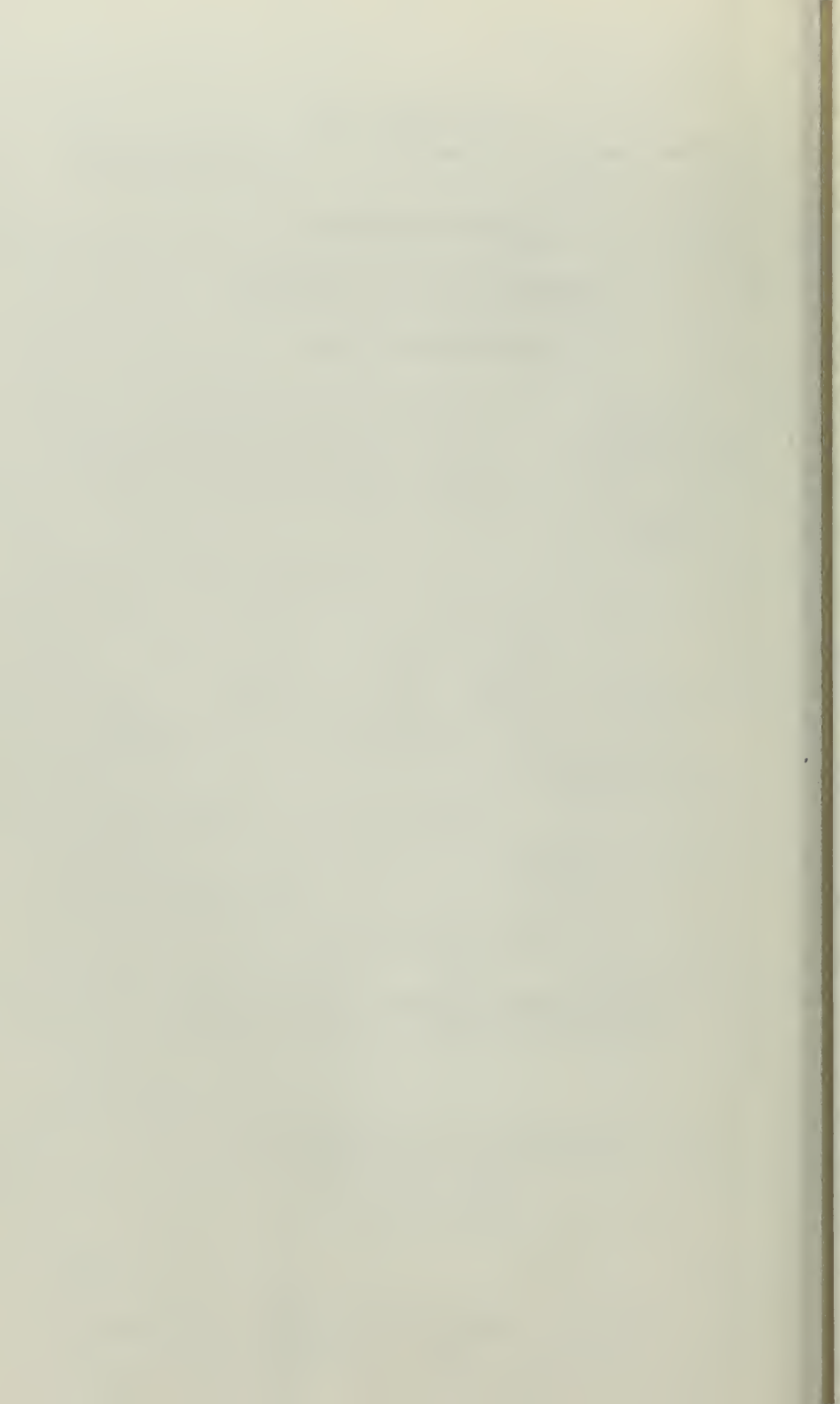
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the District Court for the Territory of Alaska,
Third Division

No. A-7644

VICTOR GOTHBERG, an Individual, Doing
Business as GOTHBERG CONSTRUCTION
COMPANY,

Plaintiff,

vs.

BURTON E. CARR, MARIE CARR, His Wife;
JACK AKERS and SHERMAN JOHN-
STONE,

Defendants.

ANSWER AND CROSS-COMPLAINT

Comes now Burton E. Carr, one of the above-named defendants, and for his separate answer to the allegations of the complaint filed herein, admits, alleges and denies as follows:

I.

Defendant admits the allegations of paragraph I of the first cause of action.

II.

This defendant, for answer to the second paragraph of the first cause of action, does admit that he did agree to employ the plaintiff to put in the foundation but denies specifically that he agreed to pay \$4,051.84, and alleges the facts to be that the plaintiff did not put in the foundation according

to the agreement and that the work on the foundation was defective and not as contracted for, and that the defendant only agreed to pay \$2,542.00 for said foundation when the same was built in compliance with the terms of the written contract, a copy of which is hereto attached, marked Exhibit "A," and made a part hereof, and this defendant further alleges that the plaintiff has been paid a sum of money in excess of the amount earned thereon and is justly indebted to this defendant by reason of the method and improper construction of said foundation, and this defendant has been damaged as will be set forth in this answering defendant's cross-complaint.

III.

This defendant for answer to the plaintiff's second cause of action admits that there was a written contract entered into wherein and whereby the plaintiff agreed to perform certain services, and the defendant agreed to pay for said services a certain sum of money, but denies specifically that the plaintiff ever performed said services in compliance with the written contract referred to in the plaintiff's second cause of action, and alleges the facts to be that the plaintiff breached the terms of said contract, failed, neglected and refused to comply therewith, and has been paid a large sum of money thereon over and above the amount actually due said plaintiff for any of the services he actually furnished and performed that were acceptable and in compliance with said contract, and

therefore this answering defendant denies that he is indebted to the plaintiff in any sum whatsoever on his second cause of action, or any part thereof.

IV.

This defendant denies the allegations of the third cause of action and the whole thereof.

V.

Defendant denies the allegations of the plaintiff's fourth cause of *action* and the whole thereof, except that defendant admits plaintiff has made various demands upon this defendant, which have been met, but the demand of this defendant for the plaintiff to perform the services and to complete the contract, and at all times offering to pay any indebtedness that he owed the plaintiff if he would finish the job in conformity to the plans, specifications and contract according to his agreement to do.

This defendant, having fully answered the plaintiff's Complaint, alleges that he is not indebted to the plaintiff in any sum whatsoever.

Cross-Complaint

Comes now the above-named defendant, Burton E. Carr, and for cross-complaint against the plaintiff, alleges and states as follows:

First Cause of Action

I.

That he did enter into a written contract with the plaintiff for certain foundation work, which

contract was executed on May 24, 1950; a copy of said contract is attached as this answering defendant's Exhibit "A," and said contract is hereby made a part of this cross-complaint as fully as if set out herein in full.

II.

This defendant further alleges that on the 19th day of September, 1950, the plaintiff and this defendant entered into a written contract for the construction of a certain building according to the plans and specifications which were then in the possession of both the plaintiff and this defendant, and after said plans and specifications had been examined in detail by both of the parties hereto, a copy of said contract of the 19th day of September, 1950, is hereto attached, marked Exhibit "B," and made a part hereof as fully as if set out in full herein.

III.

This answering defendant further states that the plaintiff failed, neglected and refused to finish the building according to the contract, plans and specifications, and by reason thereon is not entitled to maintain an action for the collection of the contract price, or any part thereof, or any other sum whatsoever.

IV.

This defendant further alleges that he has paid directly to the plaintiff the following sums: \$10,381.50, \$11,535.00, \$12,756.07, making a total of \$34,672.57; and that he has paid out for the plaintiff on matters that it was the plaintiff's duty

to pay the following, to wit: door locks, \$47.00; anchorage installation for hooking up the wash-mobile, \$175.95; and for time and material paid by this defendant for making and installing floor drain covers, \$33.80; repair of neon unit broken by plaintiff's employee, \$18.00; cost of connecting air compressor, parts, \$5.43, and labor, \$20.00; making a total of \$34,972.75, for all of which this answering defendant is entitled to judgment against the plaintiff on his first cause of action of his cross-complaint.

Second Cause of Action

I.

This answering defendant further alleges that the plaintiff failed to comply with the terms of the two written contracts, specifications and plans, as follows, to wit:

1. That the principal contract provided for the furnishing of a bond to guarantee the compliance with the terms of the contract, which the plaintiff never furnished, even though requested so to do.

2. That the plaintiff failed to hook up the lights on the 76 pump.

3. Failed to install one globe for window light on marquee.

4. Failed to install front window glass that would fit the opening made by the plaintiff, and did cause to be installed a glass therein that is unsafe, too small for the opening, and does not meet the requirements of the plans and specifications.

5. Failed to install a proper shutoff valve below the concrete in front of the building to prevent the freezing of the outside hydrant, and did install the hydrant in such a sloppy, incompetent manner without proper shutoff so that the same froze on two different occasions, causing damage to parts and requiring labor to the extent of more than \$20.00 to make repairs, and still there is no shutoff below the pavement in the proper position as meets the requirements of the ordinances of the City of Anchorage.

6. Inserted a charge of \$500.00 and attempted to collect the same for changing of a steel beam that holds the marquee that the plaintiff contracted and agreed to install in the regular contract plans and specifications.

7. Failed to finish and install outlet plates on electrical contacts.

8. Failed to furnish solid brass cylinder locks on the front doors.

9. Failed to install push plates and kick plates on five doors as per contract.

10. Failed to furnish, install and equip two-way swing doors between the showroom and shop as provided in the contract.

11. Failed to finish the installation of one heating unit with motor.

12. Failed to install three thermostats in the showroom as provided for in the contract and specifications.

13. Failed to install two additional thermostats in the shop.

14. Failed to mount and install door frames in lead according to the terms of the contract.

15. Failed to finish the building on the outside and allowed projecting wires to extend, and has left the wall rough and uneven.

16. Failed to finish the building on the inside in a workmanlike manner.

17. Installed and laid cement blocks in freezing weather without properly protecting the wall and allowed the mortar between the blocks to become frozen and the wall is dangerous and apt to disintegrate.

18. Failed to insulate the water pipes, steam pipes and sewer pipes as provided in the contract.

19. Failed and refused to take out, reinstall and refinish one section of the cement floor in the show-room which was frozen during construction and is defective and will not stand.

20. Refused to correct a condition in the floor of the boiler room so that it would drain properly, even though requested so to do.

21. Failed to replace cement blocks over rear windows in shop where the mortar was frozen in installing them and had fallen out over and around the windows, leaving a dangerous condition and causing a waste of heat from within.

22. Failed to properly install all of the windows in the shop, same being still loose and improperly fitted.

23. Failed to put on one coat of red lead and two coats of aluminum paint on all steel used in the building, and that the red lead and one coat of the aluminum paint was never furnished or put on the steel.

24. Has attempted to make an extra charge for moving a steel beam over the electric door, which beam was set at the wrong place by the plaintiff and through no fault of this defendant, and said plaintiff has constantly demanded extra pay for correcting an error, in installment by him.

25. The floor in the garage was carelessly and negligently built so that it does not drain and the work in finishing the floor was not in a workman-like manner but is defective and causes large pools of water to stand on the floor following the time that vehicles with snow on them or water are brought into the garage.

26. Failed to finish the walls in the men's rest room.

27. Refused to allow credit for 77 cement blocks saved by a change in the plans as to the installation of the south door to the garage, which blocks were of the value of \$0.65 per block.

28. Failed to install proper exhaust pipe with swivel of a manufactured and recognized product according to contract.

29. Attempted to charge and refused to remove from statement for extras the doors leading to the showroom as such doors were included in the original contract, and the attempt to collect for these doors was arbitrary, capricious, and without any justifiable reason.

30. Failed to furnish and properly install doors with closing equipment on all outside constructions as required by the contract.

31. Failed to use heavy wire mesh in gas pump lanes as called for in the specifications.

32. Attempted to and did insist on charging for extras for installing of a hoist, which was included in the contract.

33. Failed to install the mirrors in the rest rooms.

34. Laid cement blocks in sub-zero weather without heat or enclosure in violation of the terms of the specifications and contract, and the mortar was frozen and is soft and of no benefit and the blocks are loose and caused the building to become unsafe.

35. Failed to finish the building at the specified time, to wit: December 1, 1950, and dilatorily allowed the building to be unfinished until February 24, 1951, and then the building was not finished at all and has never been finished, and this defendant is entitled to recover liquidated damages of \$25.00 per day from December 1, 1950, to February 24, 1951, which amounts to \$2,150.00, and is entitled

to recover damages at the rate of \$25.00 per day from February 24, 1952, to such time as the building is finished according to the terms of the contract. That by reason of plaintiff's failure to comply with the terms of the contract, this answering defendant has been damaged by the plaintiff to the extent of \$20,000.00.

Wherefore, this answering defendant, having fully answered the plaintiff's complaint, prays for relief of this Court as follows, to wit:

1. That the plaintiff have and recover nothing against this defendant.

2. That this answering cross-complainant have and recover judgment of and against the plaintiff for the sum of \$20,000.00, together with all costs of this action, including a reasonable sum as attorneys' fees, and for such other and further relief as the Court deems just and equitable in the premises.

BELL & SANDERS,

By /s/ BAILEY E. BELL,

Of Attorneys for Defendant,
Burton E. Carr.

EXHIBIT "A"

Proposal for Revising
Nash Garage Foundation

Proposal of Victor F. Gothberg, 931 - 4th, Box 761, Anchorage, to furnish and deliver all materials and to do and perform all work in accordance with the specifications and contract of for the revision of the Nash Garage foundation situated at Lot 1, Block 20, of the East Addition to the City of Anchorage.

To: Mr. Burton E. Carr,
Box 779, Anchorage, Alaska.

Dear Sir:

The undersigned bidder has carefully examined the form of contract, the general conditions, special conditions, the technical provisions and the drawings for the revision of the Nash Garage foundation hereinbefore described, and referred to in the "Invitation to Bidders" inviting proposals on such work dated, and also the site of the work, and will provide all necessary machinery, tools, apparatus, and other means of construction, and do all the work and furnish all material called for by said specifications, general conditions, special conditions, and drawings in the manner prescribed therein and in said contract, and in accordance with the requirements of the Engineer under them, for the sum of \$2542.00.

The undersigned also agrees as follows:

First: To do any extra work, not covered by the above lump sum price, which may be ordered by the Engineer, and to accept as full compensation therefor such prices as may be agreed upon in writing by the Engineer and the Contractor in accordance with G. C. 15, "General Conditions."

Second: Within five days from the date of the "Notice of Acceptance" of this proposal, to execute the contract, and to furnish to the Owner a satisfactory contract bond in the sum specified by paragraph S. C. 9, "Special Conditions," guaranteeing the faithful performance of the work and payment of bills.

Third: To begin work on the date specified in the "Notice to Proceed," and to prosecute said work in such a manner as to complete it within forty-five calendar days.

Accompanying this proposal is a Bid Bond of \$510.00 payable to Mr. Burton E. Carr which is to be forfeited, as liquidated damages, if, in the event that this proposal is accepted, the undersigned shall fail to execute the contract and furnish satisfactory contract bond under the conditions and within the time specified in this proposal; otherwise said certified check, or bid bond, is to be returned to the undersigned.

Dated 5-24-50.

(If an individual, partnership, or non-incorporated organization.)

Signature of Bidder:

/s/ GOTHBERG CONST. CO.,

By /s/ VICTOR F. GOTHBERG.

Address of Bidder:

931 - 4th, Box 761,
Anchorage.

Names and addresses of members of the firm:

.....
.....

(If a corporation.)

Signature of Bidder:

.....

By

(Name)

(Title)

Business Address:

Incorporated Under the Laws of.....

Names of Officers:

President:

.....

(Name)

(Address)

Secretary:

.....

(Name)

(Address)

Treasurer:

.....

(Name)

(Address)

EXHIBIT "B"

This Agreement made the 19th day of September in the year Nineteen Hundred and Fifty by and between Victor Gottberg, hereinafter called the Contractor, and Mr. Burton E. Carr, hereinafter called the Owner.

Witnesseth, that the Contractor and the Owner for the considerations hereinafter named agree as follows:

Article 1. Scope of the Work—The Contractor shall furnish all of the materials and perform all of the work shown on the Drawings and described in the Specification entitled "Construction of the Nash Garage," consisting of "Scope of the Work, General Conditions, Special Conditions and Technical Provisions" prepared by Alaska Engineering Supply acting as and in these Contract Documents entitled "Engineer" and shall do everything required by this Agreement, the Scope of the Work, the General Conditions, the Special Conditions, the Specifications and the Drawings.

Article 2. Time of Completion—The work to be performed under this Contract shall be commenced September 25, 1950, and shall be completed December 1, 1950. In case of failure on the part of the Contractor to complete the work within the time fixed in the Contract or any extension thereof, the Contractor shall pay the Owner as liquidated damages the sum of \$25.00 per calendar day of delay until the work is completed or accepted.

Article 3. The Contract Sum—The Owner shall make payments on account of the Contract as provided therein, as follows: The lump sum price of Thirty-eight Thousand Four Hundred Fifty (\$38,450.00) Dollars.

Article 4. Progress Payments—The Owner shall make payments on account of the Contract as provided therein, as follows:

On or about the first day of each month ninety per cent of the value, based on the Contract price, of labor and materials incorporated in the work and of materials suitably stored at the site thereof up to the twenty-fifth day of the previous month, as estimated by the Engineer, less the aggregate of previous payments; and upon substantial completion of the entire work, a sum sufficient to increase the total payments to ninety-five per cent of the Contract price.

Article 5. Acceptance and Final Payment—Upon receipt of written notice that the work is ready for final inspection and acceptance, the Engineer shall promptly make such inspection, and when he finds work acceptable under the Contract and the Contract fully performed he shall promptly issue a final certificate, over his own signature, stating that the work provided for in this Contract has been completed and is accepted by him under the terms and conditions thereof, and the entire balance found to be due the Contractor, including the retained per-

centage, shall be paid to the Contractor at the office of the Owner within five days after the date of said final certificate.

Before issuance of final certificate the Contractor shall submit evidence satisfactory to the Engineer that all payrolls, material bills and other indebtedness connected with the work have been paid.

The making and acceptance of the final payment shall constitute a waiver of all claims by the Owner, other than those arising from unsettled liens, from faulty work appearing after final payment or from requirement of the Specifications, and of all claims by the Contractor, except those previously made and still unsettled.

If after the work has been substantially completed, full completion thereof is materially delayed through no fault of the Contractor, and the Engineer so certifies, the Owner shall, upon certificate of the Engineer, and without terminating the Contract, make payment of the balance due for that portion of the work fully completed and accepted. Such payment shall be made under the terms and conditions governing final payment, except that it shall not constitute a waiver of claims.

Article 6. The Contract Documents—The Scope of the Work, the General Conditions, the Special Conditions, the Specifications and the Drawings, together with this Agreement, form the Contract, and they are as fully a part of the Contract as if hereto attached or herein repeated.

The following is an enumeration of the Drawings:

Drawing Number	Title <u>Nash Garage</u>	Date
BCG 1	—Foundation Revision	4- 5-50
BCG 2	—Plan	7- 5-50
BCG 3	—Sections and Elevations.	7- 5-50
BCG 4	—Elevations	7- 5-50
BCG 5	—Miscellaneous Structural Details.	7- 5-50
BCG 6	—Roof Plan and Details.	7- 5-50
BCG 7	—Roof and Lintel Details.	8- 8-50
BCG 8	—Marquee Plan and Details	8-21-50
BCG 9	—Electrical Plan and Details	8-21-50
BCG 10	—Mechanical Plan and Details.	8-22-50

In Witness Whereof the parties hereto have executed this Agreement, the day and year first above written.

/s/ BURTON E. CARR,
Owner.

/s/ VICTOR F. GOTHBERG,
Contractor.

/s/ TOM E. ANDERSON,
Witness;

/s/ W. D. CUDDY,
Witness.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed June 7, 1952.

[Title of District Court and Cause.]

ANSWER TO CROSS-COMPLAINT OF
BURTON E. CARR, DEFENDANT

Comes now the plaintiff above named and for answer to the defendants' cross-complaint admits, denies and alleges as follows:

I.

Answering Paragraph I of the first cause of action of said complaint the plaintiff admits that he entered into a contract in sum and substance as set forth in Exhibit A attached to defendant's cross-complaint, whereby the plaintiff agreed to do certain work for the sum of Two Thousand Five Hundred and Forty-two Dollars (\$2,542.00). The plaintiff further alleges that said contract was modified to include additional and extra work whereby the defendant became indebted to the plaintiff in the sum of Four Thousand Fifty-one and 84/100 Dollars (\$4,051.84), which sum is now due and owing to the plaintiff. The plaintiff denies all other allegations contained in said paragraph.

II.

Answering Paragraph II of said cause of action the plaintiff admits the allegations therein contained.

III.

Answering the allegations in Paragraph III of said cause, plaintiff denies each and all of the allegations therein contained.

IV.

Answering Paragraph IV, the plaintiff admits that payment upon the contract, between the plaintiff and the defendant, of the total sum of \$34,605.00 has been made, but denies all of the other allegations in said paragraph contained.

Second Cause of Action

I.

Answering Paragraph I of the second cause of action of the defendant, Burton E. Carr, the plaintiff denies each and all of the allegations in said paragraph contained.

Wherefore, having fully answered the cross-complaint of the defendant, Burton E. Carr, the plaintiff prays that the defendant take nothing thereby; that the plaintiff be awarded his costs incurred in defending said cross-complaint, including an attorney fee to be allowed by the Court.

PLUMMER & ARNELL,

By /s/ E. L. ARNELL,

Attorneys for Plaintiff.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed June 25, 1952.

[Endorsed]: No. 13,959. United States Court of Appeals for the Ninth Circuit. Victor Gothberg, an Individual, Doing Business as Gothberg Construction Company, Appellant and Appellee, vs. Burton E. Carr, Jane Doe Carr, His Wife; Jack Akers and Sherman Johnstone, Appellees and Appellants. Supplemental Transcript of Record. Appeals from the District Court for the Territory of Alaska, Third Division.

Filed August 5, 1953.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.